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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SOCIÉTÉ DU FIGARO, SAS, a French simplified
joint-stock company; L'ÉQUIPE 24/24 SAS, a
French simplified joint-stock company, on behalf of
themselves and all others similarly situated; and LE
GESTE, a French association, on behalf of itself, its
members, and all others similarly situated,

Plaintiffs,

v.

APPLE INC., a California corporation,

Defendant.

No. No. 4:22-cv-04437-YGR

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT APPLE
INC.'S MOTION TO DISMISS FIRST
AMENDED COMPLAINT

Date: Mar. 14, 2023

Time: 2:00 p.m.

Courtroom: 1, 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

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I. INTRODUCTION

France-resident and all iOS developers build digital products that add immense value to Apple Inc.’s (Apple or Apple Inc.) mobile-device ecosystem. Imagine the iPhone without apps; few customers would want it. Thus, iOS developers enrich Apple greatly, both by enabling it to sell more expensive hardware and by paying it super-high fees in order to get their digital products to end-users. Yet Apple resorts to calling plaintiffs “opportunists” for having the audacity to challenge its anticompetitive abuses in the forum, and under the U.S. and California laws, that *Apple* chose to govern disputes. Also, Apple frets that non-U.S.-resident iOS developers might “forum-shop with an eye toward treble damages,” MTD at 14, but again, Apple chose the forum and applicable law—which in any event comports with the commercial reality that it conducts its business with iOS developers, wherever they reside, in and from the U.S. and California, per its U.S. and California contracts, policies, and practices. So now on to substance of Apple’s motion.

First, Apple’s FTAIA defense fails. (*See* Sec. IV.A.1-3, *infra*.) Apple conducts its sales of iOS app-distribution and in-app purchase (IAP) services to iOS developers, wherever they reside in the world, in and from the United States, under uniform anticompetitive terms. To get their digital products to end-users, plaintiffs had no choice but to deal with Apple Inc., which has monopolized the market for iOS app-distribution and IAP services. As plaintiffs allege, Apple’s anticompetitive behavior affected U.S. commerce and trade directly, which in turn led directly to plaintiffs’ injuries, given their participation in U.S. domestic commerce. Accordingly, U.S. antitrust law properly applies to the anticompetitive acts and injuries alleged. If the FTAIA pertains at all, plaintiffs’ antitrust claims are saved by the domestic-effects and export exceptions set forth in that Act itself. 15 U.S.C. § 6a(1)(A)-(B) and (2).

Second, Apple engages in anticompetitive, unlawful, and unfair conduct within, and emanating from, California, which California law proscribes. (*See* Sec. IV.A.3.c, *infra*.) Therefore, the Cartwright Act and UCL apply as claimed. Further, the FTAIA does not disturb these claims because it does not apply to the injuries plaintiffs sustained as a direct result of Apple’s anticompetitive behavior in U.S. commerce or trade.

1 to be eligible to distribute paid apps or in-app products, iOS developers must enter into Apple’s
 2 Developer Program License Agreement (DPLA) and certain adjuncts, which also are Internet based,
 3 and they must pay a \$99 USD, or equivalent, fee. (*E.g., id.*, ¶¶ 36, 46, 239, 244 n.235.) Membership
 4 in the program must be renewed annually, with a new payment of that fee. (*Id.*, ¶¶ 37, 47.) iOS
 5 developers must also submit their digital products to the U.S. Apple Inc. for review, approval, and
 6 publishing. (*Id.*, ¶¶ 23 n.28, 118, 244(f) and Ex. A, Sec. 6.1.) Further, Apple requires them to act as
 7 exporters of their digital products *from the U.S.*, and to deem themselves exporters. (*Id.*, ¶ 244(f)-
 8 (g).) And all developers must remit *U.S.* tax information with respect to the sale of their digital
 9 products. (“Provide U.S. tax information,” available at: [https://developer.apple.com/help/app-store-](https://developer.apple.com/help/app-store-connect/provide-tax-information/provide-us-tax-information)
 10 [connect/provide-tax-information/provide-us-tax-information.](https://developer.apple.com/help/app-store-connect/provide-tax-information/provide-us-tax-information))

11 Developers pay Apple super-high commissions set by the U.S. Apple Inc., and Apple pays
 12 developers remittances *from the United States*. (*Id.*, ¶ 244(e) and (i).) Thus, Apple’s sale of app-
 13 distribution and IAP services occur *in the U.S.*, with French-resident developers participating *in the*
 14 *domestic U.S. market*. (*E.g., id.*, ¶ 244.) Plaintiffs also must abide by harmful rules imposed by
 15 Apple Inc. (*See id.*, ¶¶ 34, 244(a), (c), and (e).) Furthermore, there is only *one* App Store, which is
 16 based in the U.S. (*E.g., id.*, ¶ 244(b).) As this Court stated in *Epic Games, Inc. v. Apple Inc.*, 559
 17 F.Supp.3d 898, 990-91 (N.D. Cal. 2021), Apple “treats app distribution as a global enterprise” with
 18 “rules and guidelines [that] apply globally.”

19 **B. The Cameron U.S. iOS developer suit**

20 A U.S. iOS developer suit, *Cameron v. Apple Inc.*, N.D. Cal. No. 4:19-cv-03074-YGR, was
 21 filed in June 2019. It settled in August 2021, *Cameron* ECF No. 451-1, with final judgment entered
 22 in July 2022, ECF No. 494. U.S. iOS developers only—and not French developers—are guaranteed
 23 relief pursuant to the compromise agreement. (*See, e.g., Cameron* ECF Nos. 53, ¶¶ 13-21, 113-14;
 24 332 at 1; 451-1, 1.1, 1.13, 5.2, and 10.1.) In fact, this Court was keen that the parties should avoid
 25 any over-reading of their release; thus, it suggested that the terms of the release should reference
 26 “claims,” *et al.*, “arising” from the same facts asserted in the *Cameron* matter, as distinct from those
 27 that “are related to” the *Cameron* “claims,” etc. (*Cameron* ECF No. 448 at 11-12.) Apple and the
 28

1 *Cameron* plaintiffs agreed. (*Cameron* ECF Nos. 448 at 12 and 451-1, ¶ 10.1.) The final judgment in
 2 *Cameron* was entered “in accordance with the terms of the Settlement.” (*Cameron* ECF No. 494.)

3 As for Apple’s references to a discovery dispute in *Cameron* regarding sales by U.S.
 4 developers via its so-called foreign storefronts, they are merely self-serving characterizations of
 5 case-specific dialogue. (*See* MTD at 3-4.) Apple can point to no acquiescence by the *Cameron*
 6 plaintiffs in whatever views Apple expressed as to the FTAIA because there was no such
 7 acquiescence. (*Cf. id.* at 4.)

8 III. STANDARDS FOR DECISION

9 Apple seeks dismissal of certain of plaintiffs’ claims—not those claims corresponding to
 10 sales of plaintiffs’ apps and in-app products to U.S. residents, MTD at 8—pursuant to Fed. R. Civ. P.
 11 12(b)(1) and 12(b)(6). (MTD at i and 7.) The standard for decisions under these rules are familiar to
 12 the Court. *E.g., In re Lithium Ion Batteries Antitrust Litig.*, 2017 WL 2021361, at *1 (N.D. Cal. May
 13 12, 2017). Because Apple attempts only facial attacks pursuant to *Rule 12(b)(1)*, MTD at 14-20
 14 (referring to supposed pleading deficiencies), “the court assumes the allegations in the complaint are
 15 true and draws all reasonable inferences in favor of the party opposing dismissal.” 2017 WL
 16 2021361, at *1. As for the rest of Apple’s motion, the *Rule 12(b)(6)* inquiry is whether the complaint
 17 “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its
 18 face.” *Id.* (citation omitted).

19 As for which parts of Rule 12 apply to Apple’s various challenges:

20 *First*, Apple disputes (a) plaintiffs’ Article III standing as to their ATT-related claims, MTD
 21 at 14-16; and (b) le GESTE’s Article III standing to sue on its own behalf or on behalf of its
 22 members, MTD at 17-20. It evidently intends these as *Rule 12(b)(1)* attacks, though it fails to say.

23 *Second*, Apple evidently seeks to apply *Rule 12(b)(6)*. For example, Apple’s challenges to
 24 plaintiffs’ *statutory* standing must be assessed under Rule 12(b)(6). *See Shulman v. Kaplan*, 2023
 25 WL 225625, at *2 (9th Cir. Jan. 18, 2023). Also, the Ninth Circuit has held that the FTAIA does not
 26 give rise to a subject-matter jurisdiction defense; rather, its terms are substantive. *See U.S. v. Hui*
 27 *Hsiung*, 778 F.3d 738, 753 (9th Cir. 2015) (“The FTAIA does not limit the power of the federal
 28 courts; rather, it provides substantive elements under the Sherman Act in cases involving nonimport

trade with foreign nations.”). Thus, Apple’s challenges that it bases on the FTAIA also must be examined pursuant to Rule 12(b)(6) standards.

IV. ARGUMENT

A. Plaintiffs’ antitrust claims are viable notwithstanding the FTAIA.

NB: Apple moves *only* to dismiss as to those developer service purchases corresponding to sales of iOS digital products to end-user consumers in or via its so-called foreign App Store storefronts. (MTD at 8.)

As for the claims Apple seeks to dismiss, plaintiffs complain of U.S. domestic behavior that harms France-resident developers, including themselves. This situation is not unlike France-resident visitors to the U.S. buying surpacompetitively priced goods from an abusive monopolist in a brick-and-mortar California store. The FTAIA was not designed to grant *carte blanche* in situations where a U.S. company’s anticompetitive conduct hurts non-U.S. residents directly. In fact, the legislative history to the FTAIA, which is excerpted in greater detail in Sec. IV.A.2.a below, explains clearly that the Act was not meant to bar antitrust claims by foreign-resident plaintiffs in these circumstances. *See* H.R. Rep. 97-686, 1982 WL 25066, at *2495 (1982) (“Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.”) (capitalization normalized). Under the facts alleged here, the FTAIA does not apply. (*See* Sec. IV.A.1(a) and (b), *infra*.)

But even if the FTAIA did apply, two built-in exceptions—the domestic-effects and export exceptions—save plaintiffs’ claims. (*See* Secs. A.2(a) and (b), *infra*.)

As for the balance of Apple’s FTAIA-related arguments—contentions as to *consumer-facing* digital storefronts, the role of Apple Distribution International Ltd. (ADI), state-law limitations, and international comity—these fail under scrutiny. None undercuts the fundamental analysis regarding the FTAIA in this case. In short, the Sherman and Clayton Acts apply as alleged.

1. Under the instant circumstances, the FTAIA does not apply.

a. Apple fails to demonstrate trade or commerce with “foreign nations.”

Apple bears the burden as movant to show that plaintiffs’ claims implicate or involve “conduct involving trade or commerce (other than import trade or import commerce) *with foreign*

1 *nations.” Cf. 15 U.S.C. § 6a (chapeau) (emphasis added). But Apple does not meet this burden. It*
 2 *does not explain how there was commerce with “foreign nations” here, nor does it surface how*
 3 *courts construe the term “foreign nations”; it simply argues that because French “news and content”*
 4 *and French speakers are involved, that must be enough. (MTD at 9.)*

5 Instead of addressing this initial matter directly, Apple begins its FTAIA excursion by
 6 presenting a quotation from *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 166
 7 (2004). (MTD at 8.) But the quote is misleading in its reference to “foreign harm,” due to Apple’s
 8 omission of critical context. Per the court in the sentence preceding the (incompletely) quoted line:
 9 “[T]he higher foreign prices of which the foreign plaintiffs here complain *are not the consequence of*
 10 *any domestic anticompetitive conduct that Congress sought to forbid*, for Congress did not seek to
 11 forbid any such conduct insofar as it is here relevant, *i.e., insofar as it is intertwined with foreign*
 12 *conduct that causes independent foreign harm.” Id. at 165-66 (emphasis in original and added).*

13 Here, in contrast, plaintiffs allege that they participated in domestic U.S. commerce with
 14 Apple and that their injuries were the direct consequence of Apple’s “domestic anticompetitive
 15 conduct that Congress sought to forbid,” *e.g.*, FAC, ¶¶ 239-40; *see also, e.g., id.*, 241-45. *See*
 16 *Empagran*, 542 U.S. at 166; *see also Hui Hsiung*, 778 F.3d at 751 (“For the Sherman Act to apply to
 17 nonimport trade or commerce with foreign nations, *the conduct at issue* must have a direct,
 18 substantial, and reasonably foreseeable effect. . . on trade or commerce which is not trade or
 19 commerce with foreign nations.”) (emphasis added). In this case, there is no “foreign harm” in the
 20 way that Apple would have it.

21 Because Apple fails to meet its burden, its challenges to plaintiffs’ claims that are based on
 22 the FTAIA should be rejected outright.

23 **b. By contrast, plaintiffs have amply alleged their participation in the U.S.**
 24 **domestic marketplace, underscoring the FTAIA’s inapplicability.**

25 By contrast, plaintiffs have amply alleged that they participated in the *domestic* marketplace
 26 by doing business with Apple Inc., per its anticompetitive terms and pricing, including by electronic
 27 means. (*See, e.g.*, FAC, ¶¶ 239-45.)
 28

1 To begin, the governing contracts and guidelines between Apple and iOS developers,
 2 including plaintiffs, underscore that Apple Inc., the U.S. entity, sets and applies the terms under
 3 which it provides iOS app-distribution and IAP services to iOS developers, wherever they reside.
 4 (*See, e.g.*, FAC, ¶¶ 241, 244; *see also, generally*, Exs. A at 1-2 (DPLA, referring to “LEGAL
 5 AGREEMENT BETWEEN YOU AND APPLE” and “Apple” as “Apple Inc., a California
 6 corporation, with its principal place of business at . . . Cupertino, California, . . . U.S.A.”) and B at 1,
 7 20 (guidelines referring to “*the* App Store,” “*the* Apple ecosystem,” and Apple, as well as the DPLA,
 8 to which Apple is the counter-party) (emphasis added).) To the nth degree, Apple’s business model
 9 is built on uniformity and control worldwide. (*See, e.g., Id.*, ¶ 244.) *See Epic Games*, 559 F. Supp. 3d
 10 at 943 (“Apple does not negotiate terms [with developers] generally.”). What’s more, Apple provides
 11 in these contracts that disputes between the parties are to be governed by U.S. and California law and
 12 brought in a California-based forum, underscoring the domestic nature of the parties’ trade or
 13 commerce. (*Id.*, ¶¶ 244 and Ex. A, Sec. 14.10; *see also id.*, ¶ 253 and Ex. C at Sec. 17.)

14 In addition to their U.S.-based contractual relationship, plaintiffs have alleged plausibly that
 15 they participated in domestic U.S. commerce in their interactions with Apple as to iOS app-
 16 distribution and IAP services. (*E.g., id.*, ¶¶ 239-44.) Apple’s monopoly of iOS app-distribution and
 17 IAP services means developers are limited to procuring these services from Apple, a domestic
 18 company, in the United States. (*E.g., id.*, ¶¶ 44, 54, 239-44.)

19 As for Apple’s reference to plaintiffs’ allegation referring disjunctively to “interstate
 20 commerce or trade or commerce with foreign nations,” *Id.*, ¶ 211, it does not survive scrutiny.
 21 Plaintiffs do not “contend” that Apple’s pertinent activities constitute “trade or commerce with
 22 foreign nations.” (*Cf.* MTD at 9.) To the contrary, plaintiffs’ complaint is replete with supported
 23 allegations that plaintiffs participated in the *domestic* U.S. marketplace. (*See, e.g.*, FAC, ¶ 244.)
 24 Plaintiffs allege that Apple’s activities “were within the flow of, and substantially affected, interstate
 25 commerce or trade *or* commerce with foreign nations.” (*Id.*, ¶ 211 (emphasis added).) And they add
 26 in the alternative that as a monopsonist, Apple acts without regard to state or international lines
 27 “from or within California.” (*See id.*) In any event, these allegations also are made in view of the
 28 reference in Sherman Act Sec. 2 to “trade or commerce among the several States, or with foreign

nations,” 15 U.S.C. § 2, and in light of plaintiffs’ *alternative* allegations referring to import and export activities, FAC, ¶¶ 247-49.

Neither does *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293 (3d Cir. 2002) (overruled by *Animal Sci. Prods., Inc. v China Minmetals Corp.*, 654 F.3d 462, 469 (3d Cir. 2011), for erroneously analyzing the FTAIA as if it imposed a jurisdictional bar rather than a substantive merits limitation), aid Apple’s cause. (*See* MTD at 10-11.) There, the court affirmed a dismissal of plaintiffs’ claims where they had “‘aver[red] nothing from which [the trial court] could find that Defendants’ purported conspiracy caused any injury which was felt in the U.S. or which affected the American economy in any way.’” *Id.* (citation omitted). Here, by contrast, plaintiffs have averred much to show that Apple’s anticompetitive conduct has had direct, deleterious effects on U.S. trade or commerce. (FAC, ¶¶ 239-55.) Further, these effects have given direct rise to plaintiffs’ injuries. (*Id.*)

Apple also makes spurious claims regarding that court’s references to computer systems and instruments in the U.S. (MTD at 10-11.) But the references regarding connections to computers and instruments in the U.S., and to commissions paid in U.S. dollars, were made in evaluating plaintiff’s assertion that “a foreign travel agent’s access to a computer system based in the United States ‘transforms’ ‘foreign commerce’ into ‘import commerce,’” even though the inquiry there should have focused on “the conduct of the defendants—not the plaintiffs.” 303 F.3d at 303-304. Apple’s bracketed insertion of “domestic” into an analysis cabined to the FTAIA’s *import exception* is not supported by the text and thus is unavailing. (*Compare* MTD at 10-11, *with* 303 F.3d at 303-04.)

In short, plaintiffs’ participation in the domestic marketplace further illustrates that there is no commerce with foreign nations here, within the meaning of the FTAIA.

2. Even if the FTAIA applied, the domestic-effects and export exceptions save plaintiffs’ claims.

a. Apple’s anticompetitive conduct resulted in domestic effects that were the direct cause of plaintiffs’ injuries, such that plaintiffs may proceed with their antitrust claims.

But even if Apple had met its burden to demonstrate the applicability of the FTAIA, the domestic-effects exception to that Act, 15 U.S.C. 6a(1)(A), would save plaintiffs’ claims. Here, the anticompetitive conduct alleged—including willful acquisition and maintenance of monopoly power

1 and abuses thereof—is *U.S. domestic conduct* undertaken by a U.S. company. Further, this “conduct
2 has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce which is not
3 trade or commerce with foreign nations.” *Id.*

4 And it is this U.S. conduct, which “has a direct, substantial, and reasonably foreseeable
5 effect” on domestic “trade or commerce,” that has harmed plaintiffs and other France-resident
6 developers directly, FAC, ¶ 241, just as it has harmed U.S.-resident iOS developers. *See Hui Hsiung*,
7 778 F.3d at 758 (“Conduct has a ‘direct’ effect for purposes of the domestic effects exception to the
8 FTAIA if it follows as an immediate consequence of the defendants’ activity.”) (citation omitted).
9 There was no attenuation or intervening causation—Apple simply applied its anticompetitive
10 commission rates, policies, and practices, *as conceived and implemented in and from the U.S.*, to
11 plaintiffs. After all, Figaro, L’Équipe, and other proposed class members had no choice but to
12 transact with Apple to get their digital products to end-users. Under these circumstances, plaintiffs’
13 France residency does not bar their claims; to the contrary, the FTAIA was not meant to, and does
14 not, provide Apple with an escape from plaintiffs’ efforts at redress. *See* 15 U.S.C. 6a(1)(A) and (2).

15 The FTAIA’s legislative history explains the reason for its adoption, and what it was and was
16 not meant to do. It thus illuminates the wording of the statute, so it bears excerpting at length:

17 The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from
18 the antitrust laws *conduct that does not have the requisite domestic effects. This test,*
19 *however, does not exclude all persons injured abroad from recovering under the*
20 *antitrust laws of the United States. A course of conduct in the United States-- e.g.,*
21 *price fixing not limited to the export market-- would affect all purchasers of the target*
22 *products or services, whether the purchaser is foreign or domestic. The conduct has*
23 *the requisite effects within the United States, even if some purchasers take title abroad*
24 *or suffer economic injury abroad. Cf., e.g., Pfizer Inc., et al v. Government of India, et*
25 *al, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our*
26 *antitrust laws in the domestic marketplace, just as our citizens do. Indeed, to deny*
27 *them this protection could violate the friendship, commerce and navigation treaties*
28 *this country has entered into with a number of foreign nations.*

There are other reasons for preserving the rights of foreign persons to sue under our
laws when the conduct in question has a substantial nexus to this country. As the
Supreme Court pointed out in Pfizer, supra, 434 U.S. at 314-315, to deny foreigners a
recovery could under some circumstances so limit the deterrent effect of United States
antitrust law that defendants would continue to violate our laws, willingly risking the
smaller amount of damages payable only to injured domestic persons.

While H.R. 5235 preserves antitrust protections in the domestic marketplace for all
purchasers, regardless of nationality or the situs of the business, a different result will
obtain when the conduct is solely export-oriented. Thus, a price-fixing conspiracy

1 directed *solely* to exported products or services, absent a spillover effect on the
 2 domestic marketplace (see Pt. E(2), *infra*), would normally not have the requisite
 effects on domestic or import commerce. Foreign buyers injured by *such* export
 conduct would have to seek recourse in their home courts.

3 ***

4 The Committee did not believe that the bill reported by the Subcommittee was
 intended to confer jurisdiction on injured foreign persons *when that injury arose from*
 5 *conduct with no anticompetitive effects in the domestic marketplace*. Consistent with
 this conclusion, the full Committee added language to the Sherman and FTC Act
 6 amendments to require that the ‘effect’ providing the jurisdictional nexus must also be
 the basis for the injury alleged under the antitrust laws. *This does not, however, mean*
 7 *that the impact of the illegal conduct must be experienced by the injured party within*
the United States. As previously set forth, it is sufficient that the conduct providing the
 8 *basis of the claim has had the requisite impact on the domestic or import commerce of*
the United States, or, in the case of conduct lacking such an impact, on an export
 9 opportunity of a person doing business in the United States.

10 H.R. Rep. 97-686, 1982 WL 25066, at *2495, 2496-97 (1982) (capitalization normalized) (emphasis
 11 added).

12 Consistent with the Act’s legislative history, this Court has stated that the “locus of a
 13 transaction is not dispositive under the FTAIA,” which “does not state or support a *per se* rule
 14 excluding foreign purchasers just because they did their buying abroad.” *Batteries*, 2017 WL
 15 2021361, at *4 (citation omitted). So even if plaintiffs were considered “foreign purchasers” that
 16 “did their buying abroad,” they were injured by way of anticompetitive conduct impacting the
 17 domestic commerce of the United States. For example, they paid *the* supracompetitive rates set and
 18 charged in the United States. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 785 F. Supp. 2d 835,
 19 844 (N.D. Cal. 2011) (denying motion to dismiss where plaintiffs alleged sufficiently for purposes of
 20 the “domestic injury exception” that “U.S. prices therefore were not simply ‘the source of’ the
 21 foreign prices; both the domestic and foreign prices were one and the same.”).

22 As for Apple’s attempted counter to the domestic-effects exception, its reliance on *In re*
 23 *Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008), and
 24 *Empagran* is misplaced. Plaintiffs do not allege that effects from a “price-fixing conspiracy” gave
 25 rise to “foreign injury,” *DRAM*, 546 F.3d at 988, or that an “international price-fixing arrangement”
 26 with roundabout domestic effects led to their “foreign injury,” *Empagran*, 542 U.S. at 175. Rather,
 27 plaintiffs allege that Apple on its own behaves anticompetitively in the U.S. and uses its monopoly
 28 power to set abusive prices and policies; these deleteriously affect U.S. commerce and *directly* harm

U.S. developers and non-U.S.-resident developers such as plaintiffs, wherever they reside, FAC, ¶ 241. *See TFT-LCD*, 785 F. Supp. 2d at 844 (referring to allegations that U.S. prices were not merely the source of foreign prices, but were one and the same).

b. Per Apple itself, plaintiffs are exporters, such that plaintiffs may proceed with their antitrust claims

As an *alternative* basis for an exception from the FTAIA, plaintiffs qualify as exporters as referenced therein, per Apple’s designation of non-U.S.-resident iOS developers (including plaintiffs) as exporters and its requirements that they behave as such. (FAC, ¶¶ 244-49 and Ex. A, Schedule 1, ¶¶ 2.1-2.3.) The Act refers to “export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States,” 15 U.S.C. § 6a(1)(B), and the policies and supra-competitive prices that Apple imposes on developers as exporters of iOS digital products has “direct, substantial, and reasonably foreseeable effect” on their sales *under Apple’s own theory of how iOS digital product business is conducted*. (See MTD at 6-7.) As for Apple’s claim that there is no injury to export business in the U.S. under this alternative theory, MTD at 12-13, the Act refers only to persons engaged in export trade or commerce in the U.S., 15 U.S.C. § 6a(1)(B), which Apple deems plaintiffs to be. (FAC, ¶ 246.) This meets the export exception to the FTAIA, particularly at this stage of the case, where plaintiffs have not been able to explore all the reasons for, and consequences of, Apple deeming them exporters. *See Gen. Elec. Co. v. Latin Am. Imps., S.A.*, 187 F. Supp. 2d 749 (W.D. Ky. 2001) (declining to dismiss Sherman Act counterclaims on motion to dismiss where foreign-company plaintiff alleged it was “engaged in U.S. export trade in its complaint”).

3. The balance of Apple’s theories regarding the FTAIA are unavailing.

Per the foregoing, the FTAIA does not affect the viability of plaintiffs’ antitrust claims, despite Apple’s assertions. Apple’s remaining FTAIA arguments also do not compel dismissal.

a. Apple’s references to its *consumer-facing* digital storefronts are of no consequence.

Apple’s foreign-storefront characterizations, MTD at 2, 6-7, do not affect the viability of plaintiffs’ claims. This case is about Apple’s willful acquisition of monopoly power, and its abuses of that power, with respect to *developers*. The Supreme Court has recognized that Apple does

business with both developers and end-user consumers directly, but separately. *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019). Apple itself observes that it sells app-related distribution services *to developers*. (FAC, ¶ 220.) Although there may be multiple *consumer-facing digital façades* of the App Store, there is only *one* App Store with which *developers* interact—the one U.S.-based and operated App Store. (*E.g., id.*, ¶¶ 3, 10, 244.) Thus, Apple’s sales of the services at issue occur in the U.S. (*Id.*, ¶¶ 26, 67, 239.) Apple’s “categorization” authorities, MTD at 9, are inapposite because *all* sales and purchases of iOS app-distribution and IAP services were and are directly affected by Apple’s U.S. unlawful conduct. (*Id.*, ¶¶ 5, 239-42.) Which “storefront” *end-users consumers* interact with is irrelevant to claims based on plaintiffs’ *developer* commerce with Apple.

b. Apple’s references to ADI are unavailing.

In a footnote, Apple raises its related company ADI as a supposed foreign participant in Apple’s business with plaintiffs, evidently in an attempt to undercut plaintiffs’ allegations as to their participation in the U.S. domestic marketplace. (MTD at 11 n.12.) But notably, Apple does not assert that ADI undertook any of the behavior that plaintiffs allege to be anticompetitive, *see id.*, nor was ADI the counter-party to the DPLA—Apple Inc. was. (FAC, Ex. A at 1.) Apple Inc.’s possible use of ADI to help perform certain of its duties as signatory to the contracts at issue could at most bear further inquiry and analysis. Indeed, Apple itself refers to ADI as a mere “intermediary,” MTD at 11, which makes sense given that plaintiffs already have demonstrated that *Apple Inc.* pays them proceeds. (FAC, ¶ 244(i).) In short, Apple’s references to ADI are unavailing.

c. Plaintiffs’ state law claims are not barred by the FTAIA (nor any territorial limits).

Because plaintiffs’ federal antitrust claims are not subject to dismissal on the basis of the FTAIA, plaintiffs’ state law claims are not subject to dismissal on that basis, either. Apple’s claim that plaintiffs “acknowledge that the FTAIA can ‘affect, bar, or limit plaintiffs’ . . . state-law claims,” MTD at 14, is disingenuous. Plaintiffs *actually* plead that, even under theories advocated by Apple, the FTAIA would not bar plaintiffs’ claims. Plaintiffs allege Apple has undertaken unlawful behavior in the U.S., FAC, ¶¶ 258-78, specifically in California. (*Id.*, ¶¶ 283-85, 297-99.) That is, Apple, a California company headquartered in California, with its principal place of business

1 therein, *id.*, ¶ 34, has conducted itself unlawfully, per California law, by monopolizing the posited
 2 markets, abusing its market power as alleged, and contravening the UCL. (*Id.*, ¶¶ 283-85, 297-99.)
 3 And these actions, taken in California, have resulted in the harms alleged by plaintiffs.

4 Notably, *Apple* chose California law to govern this dispute. And California has a strong
 5 interest in regulating and deterring unlawful behavior by a California corporate citizen and resident.
 6 *See, e.g., Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 243 (2001), (referring to “conduct
 7 emanat[ing] from California,”); *see also In re Tobacco II Cases*, 46 Cal.4th 298, 312 (2009) (UCL
 8 provisions focus “on the defendant’s conduct, rather than the plaintiff’s damages, in service of the
 9 statute’s larger purpose of protecting the general public against unscrupulous business practices.”).
 10 Further, the Cartwright Act and UCL are not co-extensive with federal antitrust law, so even if the
 11 FTAIA were to apply to plaintiffs’ federal claims, such would not automatically bar these state-law
 12 claims. *See, e.g., In re Cipro Cases I & II*, 61 Cal. 4th 116, 160-161 (2015) (Cartwright Act is
 13 “broader in range and deeper in reach than the Sherman Act”) (citation omitted); *Epic Games*, 559 F.
 14 Supp. 3d at 1053-55 (UCL is broader than Sherman and Cartwright Acts, and reaches “incipient”
 15 violations of antitrust laws).

16 Apple’s other assertions—that plaintiffs’ claims fail because California law was not meant to
 17 apply to “extraterritorial conduct,” or extraterritorially, MTD at 14—likewise fail because plaintiffs
 18 copiously allege that Apple’s bad conduct took place in California. (*E.g.*, FAC, ¶¶ 244, 253-254.)
 19 Apple’s authorities do not counsel dismissal under these circumstances. *See Ubiquiti Networks, Inc.*
 20 *v. Kozumi USA Corp.*, 2013 WL 368365 at *9 (N.D. Cal. Jan. 29, 2013) (“Defendants’ failure to
 21 explain how Plaintiff’s conduct undermined competition in domestic markets means that they have
 22 similarly failed to explain how Plaintiff’s conduct undermined competition in a California market
 23 [under the Cartwright Act].”); *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074, 1094
 24 (N.D. Cal. 2019) (“[The UCL] appl[ies] where the relevant conduct occur[s] in California.”)
 25 (citations omitted). At most, Apple raises issues of material fact as to its conduct.

d. **“Comity” also not give rise to dismissal, either on the basis of the FTAIA or otherwise.**

Apple also invokes international comity, which “is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection its laws.” *Cruz v. United States*, 387 F. Supp. 2d 1057, 1069 (N.D. Cal. 2005) (citation omitted). Comity is an affirmative defense for which the moving party bears the burden of proof. *Id.* But Apple has not met that burden, as it points to no “legislative, executive, or judicial act[]” to which the Court should defer. Mere investigations, like those undertaken by the European Commission, do not qualify as “acts” that counsel deference. *Cf. id.* at 1069-1070 (denying motion to dismiss on comity grounds despite recommendations issued by a special commission of the Mexican Congress). Also, Apple points to no rulings from the French Competition Authority regarding Apple’s monopoly over the market for iOS apps and IAP. In any event, Apple has not explained how a decision by this Court to abstain would demonstrate “due regard” to the rights of plaintiffs in this case under the U.S. federal and California laws that Apple chose to govern this matter, *Cruz*, 387 F. Supp. 3d at 1069. *See* H.R. Rep. 97-686, 1982 WL 25066, at *at 2495 (“Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.”) (capitalization normalized). Apple’s comity theory does not give rise to dismissal.

Finally, as to all of Apple’s FTAIA-based challenges, it would be improper to dismiss plaintiffs’ antitrust or other claims on a Rule 12(b)(6) motion. *See Batteries*, 2017 WL 2021361, at *5 (“The Court finds the allegations of proximate causation sufficient as a pleading matter and declines to reach the merits of plaintiffs’ theory without further factual development.”); *see also In re Capacitors Antitrust Litig.*, 2016 WL 5724960, at *1-2, 4 (N.D. Cal. Sept. 30, 2016) (discussing summary judgment procedures for deciding FTAIA issues, where evidence was and could be adduced). Should the Court hesitate to rule outright that Apple’s FTAIA defense is unavailing without further inquiry, then discovery should continue toward further factual development and resolution at a later date, perhaps on summary judgment if not at trial, per *Batteries* and *Capacitors*,

as well as the Ninth Circuit’s conclusion that the FTAIA raises substantive merits issues, *Hui Hsiung*, 778 F.3d at 751.

B. Apple’s implementation of ATT is another redressable abuse of its monopoly power.

Apple apparently challenges plaintiffs’ right to seek relief with respect to its ATT regime—a recent program that mandates certain advertising-related developer terms, *see* FAC, ¶¶ 198-201—only insofar as plaintiffs’ Sherman Act claims are concerned. (MTD at 3, 6, 14-17.) It makes no mention of plaintiffs’ UCL or Cartwright Act claims insofar as those Acts provide for redress as to ATT.

Where plaintiffs’ Sherman Act claim is concerned: Apple’s implementation of its ATT regime is another abuse of its monopoly power in the services market that plaintiffs have pled. (FAC, ¶¶ 198-202.) Apple can implement ATT because it is the sole gateway between developers and customers for their iOS apps; it has monopolized iOS app-distribution services, so it can cut off developers from distributing their iOS digital products to end-users if they do not adhere to its policies.

ATT *requires* developers, including Figaro, L’Équipe, and le GESTE’s developer members to conform to its ATT requirements if they wish to “track” consumers for advertising purposes—a concept defined by Apple for purposes of the program. (FAC, ¶¶ 200 (*citing* “Mobile Ecosystems: Market Study Final Report,” U.K. Competition & Markets Authority (CMA Final Report), at 236-40.) This definition of “tracking” advantages Apple. (*Id.*, ¶ 200.) Further, Apple’s program rules inhibit consumers from making truly informed choices about whether to opt-in or out of “tracking”; Apple also prohibits developers, including Figaro and L’Équipe, from incentivizing consumers in exchange for opting-in. (*Id.*, ¶ 201 and Ex. B at 3.2.2(vi) (per new ATT provision, developers may not pay or otherwise compensate consumers for enabling tracking); *see also* CMA Report at 235 (discussing Apple’s prohibition on incentivizing consumers to opt-in).) So this is *not* benignly offering consumers more choice, *cf. Blix Inc. v. Apple Inc.*, 2021 WL 2895654, at *4 (D. Del. July 9, 2021) (developers only required to offer Apple’s SSO product if they offered another); it is a ham-fisted injection of Apple between developers and *their* app customers undertaken as yet another abuse of its monopoly power, as plaintiffs allege. (FAC, ¶¶ 198-201.) (Accordingly, developers do

1 not “acknowledge that ATT is ‘good for end-user consumers.’” (MTD at 15.) In falsely portraying
 2 plaintiffs’ view in this regard, Apple omits their framing of the partially excerpted allegation with
 3 *ostensibly*, as well as plaintiffs’ immediately following allegations that “Apple’s ATT program will
 4 mean less free-to-get apps [available for consumers]; developers will forgo creating them, or will
 5 begin to charge fees for heretofore free-to-get apps, because they will be unable to make a living by
 6 means of advertising.” (FAC, ¶ 199.))

7 Monetization for free-to-get apps ought properly to be worked out between developers and
 8 their customers—particularly when Apple’s implementation of ATT is tilted to Apple’s commercial
 9 advantage. (See FAC, ¶¶ 200, 202.) Apple’s cramming of 1.8 million apps into *one* iOS app store
 10 frequently requires app-install advertising, and now Apple has made its App Store search ads more
 11 attractive by unfair means, and more expensive, too (when already they were uniquely advantaged
 12 because Apple exclusively controls App Store space). (*Id.*, ¶ 202.)

13 Figaro and L’Équipe, as well as le GESTE’s developer members, have suffered “concrete and
 14 particularized” injury that is “actual or imminent,” as required for Article III standing, *see Spokeo,*
 15 *Inc. v. Robins*, 578 U.S. 330, 339 (2016), by way of Apple’s implementation of ATT: the program
 16 presently inhibits how they can utilize space within *their*—not Apple’s—free-to-get apps, and within
 17 *their*—not Apple’s—subscription in-app products, for paid advertising. (See FAC, ¶¶ 199-201.) This
 18 affects the number of transactions within plaintiffs’ posited market. Apple, via ATT, also affects the
 19 availability of, and innovation as to, apps, particularly free-to-get apps, as it hijacks the
 20 developer/end-user relationship and developers’ ability to monetize. (*Id.*, ¶ 199.) And it also affects
 21 developers’ ability to have their apps seen and downloaded, due to its deleterious effects on app-
 22 install advertising. (*Id.*, ¶ 202.) Figaro, L’Équipe, and le GESTE’s developer members are, therefore,
 23 the “immediate victims” of Apple’s antitrust violations. *See Eagle v. Star-Kist Foods, Inc.*, 812 F.2d
 24 538, 542 (9th Cir. 1987) (*citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of*
 25 *Carpenters*, 459 U.S. 519, 541 (1983)). All of this, in turn, injures competition in the pled app-
 26 distribution and IAP services market: fewer and less-innovated apps available and distributed to
 27 consumers also means fewer sales of these distribution services (including with respect to in-app
 28 products).

ATT as a required program should be rescinded or altered, by injunction if necessary. *See, e.g., Spokeo*, 578 U.S. at 338 (Article III standing requires that injury is “likely to be redressed by a favorable judicial decision”). At the very least, plaintiffs’ claims as to ATT, including its effect on competition in the posited market, raise issues of material fact that require resolution before their disposition.

C. Le GESTE, an association representing certain iOS developers, may proceed with its claims for non-monetary relief.

Le GESTE has standing to sue in its own right because Apple’s actions have caused it concrete injuries. It also has associational standing, as well as federal and state statutory standing.

1. Le GESTE has standing to sue in its own right.

The Ninth Circuit has held that “an organization has direct standing to sue where it establishes that the defendant’s behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose.” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). Given these criteria, le GESTE has direct standing to sue. Apple’s anticompetitive behavior is anathema to le GESTE’s goal of ensuring competitive markets for online publishers, FAC, ¶ 62, because it undermines competition in the app world (which many online publishers use to broadcast their work). Apple’s misconduct therefore presents an injury to le GESTE’s organizational mission. *Cf. La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Apple’s citation to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), to claim that le GESTE’s injury must be a direct antitrust injury (MTD at 18) is not persuasive here because that case did not address the requirements for *associational* standing under federal or state antitrust laws. (*See also* Sec. IV(C)(3), *infra* (discussing le GESTE’s associational standing under both federal and state antitrust laws).)

Finally, Apple’s argument that le GESTE’s injury does not qualify under the FTAIA as an “effect” that proximately causes le GESTE’s harm is irrelevant. As Plaintiffs have already explained, the FTAIA does not apply here. (*See* Sec. IV(A)(2), *supra*.) Further, Apple has made this argument in one of its many substantive-argument footnotes, so it ought to be ignored, as should all such arguments. *See Trump v. Intuitive Surgical, Inc.*, 2020 WL 3163185, at *6 n.4 (N.D. Cal. June 12,

2020) (“A footnote is the wrong place for substantive arguments on the merits of a motion, particularly where such arguments provide independent bases for dismissing a claim not otherwise addressed in the motion.”) (citation omitted); *see also* Order Striking Pls.’ Reply Brief in Supp. of Class Certification, *Hatamian v. Advanced Micro Devices*, N.D. Cal. No.: 14-cv-00226-YGR (Dec. 8, 2015), at ECF. No. 166 therein.

In response to Apple’s actions, le GESTE “diverted and devoted” significant human and financial resources “to research, investigate, and analyze these specific iOS app-distribution and IAP-related issues.” (FAC, ¶ 62.) Plaintiffs described this diversion of resources in detail, noting that “all four of le GESTE’s permanent employees” have set aside other matters that are central to le GESTE’s mission to focus on “addressing Apple’s anticompetitive practices.” (*Id.*, ¶ 63.) Le GESTE has been forced to deprioritize “several planned projects concerning media corporate social responsibility; research to address issues around emerging technologies, including artificial intelligence; and a project to publish guidelines on the ad tech value chain.” (*Id.*, ¶ 63.) Postponing these activities “has significantly interfered with le GESTE’s mission” of “advocat[ing] generally for competitive markets for online publishers.” (*Id.*, ¶¶ 62, 63.) Le GESTE specifically disavows that any of these efforts were “in anticipation of litigation, or for litigation purposes.” (*Id.*)

2. Le GESTE has associational Article III standing to sue on behalf of its members.

In addition to having standing to sue in its own right, le GESTE also has associational standing under the *Hunt* test because “(a) its members would otherwise have standing to sue in their own right; [and] (b) the interests it seeks to protect are germane to [its] purpose.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

a. Le GESTE can rely on its members’ standing for associational standing purposes.

Aside from the FTAIA issues briefed above, Apple does not contest that Figaro and L’Équipe have individual standing to sue. Apple’s argument that Figaro and L’Équipe’s individual standing cannot provide associational standing for le GESTE, simply because those entities have also sued Apple in their individual capacity, has no basis in any of the caselaw Apple cites. Furthermore, other members of le GESTE—including TF1, M6, France TV, Radio France, Groupe Canal+, RTL, and

Deezer—also have standing to sue in their own right. As plaintiffs alleged in their Amended Complaint, these developers have been harmed by Apple’s anticompetitive behavior because they “have paid Apple’s mandatory USD \$99 annual developer fee” and are subject to Apple’s 30% default commission on sales. (FAC, ¶ 56.) Because its members have standing to sue, le GESTE meets the first requirement of the *Hunt* test.

b. Allegations of le GESTE’s purpose are sufficient to prevail against Apple’s challenge on a motion to dismiss.

Le GESTE is seeking injunctive relief to prevent Apple from engaging in anticompetitive behavior that directly affects online publishers who participate in the market via iOS apps. (*Id.* ¶¶ 266, 278, 285, 288, 298.) This litigation therefore is germane to le GESTE’s mission to promote “competitive markets for online publishers.” (*Id.*, ¶ 62.) Apple’s citation to *Med. Ass’n of State of Ala. v. Schweiker*, 554 F. Supp. 955 (M.D. Ala. 1983), does not change this analysis. In that case, an association attempted to represent its members, all of whom were physicians, in their capacity as taxpayers. The court denied standing to the Association because there was no “reasonable connection” between the organization’s objectives in the litigation and “the reasons the members joined the organization.” *Id.* at 965. But here, online publishers joined le GESTE knowing its mission of ensuring competitive markets for them. (FAC, ¶ 62.) At the very least, determining whether a sufficient nexus exists between le GESTE’s stated goals and the subject matter of this suit is a question of material fact that cannot be answered at this stage of the proceedings.

Apple’s theory that a conflict of interest among le GESTE’s members precludes associational standing also fails. In *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401 (9th Cir. 1991), which Apple itself cites, the Ninth Circuit explicitly “reject[ed] the invitation to expand our interpretation of *Hunt*’s third prong to require that no actual or potential conflict exist between the organization’s members.” *Id.* at 1408. Organizations should resolve conflicts “through [their] own internal procedures,” and courts should not intervene “through limitations on standing.” *Id.* at 1409. Apple’s citations to other circuit court cases are irrelevant given that the Ninth Circuit has directly ruled on this question.

1 **3. Le GESTE’s allegations also are sufficient for statutory standing purposes.**

2 Federal law: Contrary to Apple’s claims, courts have regularly upheld associational standing
 3 in federal antitrust actions seeking injunctive relief pursuant to Section 16 of the Clayton Act. *See*,
 4 *e.g.*, *Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 923 (7th Cir. 1995); *Associated Gen.*
 5 *Contractors of N. Dakota v. Otter Tail Power Co.*, 611 F.2d 684, 689 (8th Cir. 1979); *Mission Hills*
 6 *Condo. Ass’n M-1 v. Corley*, 570 F. Supp. 453, 458 (N.D. Ill. 1983). Apple’s citation to *Ass’n of Am.*
 7 *Physicians & Surgeons v. FDA*, 13 F.4th 531, 540 (6th Cir. 2021), fails to note that the Sixth Circuit
 8 ultimately applied the associational standing test given “directly on-point precedent” from the
 9 Supreme Court. *Id.* at 542. And Apple’s citation to one court’s equivocal view on this question,
 10 expressed in preliminary injunction proceedings, rather than dispositively, in *Fin. & Sec. Prods.*
 11 *Ass’n v. Diebold, Inc.*, 2005 WL 1629813 (N.D. Cal. July 8, 2005), ignores that this view is squarely
 12 a minority position. The majority of courts, including this Court in *Coal. for ICANN Transparency*
 13 *Inc. v. VeriSign, Inc.*, 2007 WL 9734349, at *6 (N.D. Cal. May 14, 2007), find that organizations can
 14 seek associational standing under Section 16 of the Clayton Act. As such, le GESTE’s allegations are
 15 sufficient for statutory standing purposes under Section 16 of the Clayton Act.

16 State law: As for state-law statutory standing, “federal courts are bound by decisions of the
 17 state’s highest court.” *Teleflex Med. Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 851 F.3d
 18 976, 982 (9th Cir. 2017). In the absence of such a ruling, “a federal court must predict how the
 19 highest state court would decide the issue using intermediate appellate court decisions.” *Id.*

20 California state courts have explicitly recognized associational standing for organizations
 21 seeking injunctive relief under the Cartwright Act. *See California Dental Ass’n v. California Dental*
 22 *Hygienists’ Ass’n*, 222 Cal. App. 3d 49, 61, 271 (1990). Because le GESTE seeks only injunctive
 23 relief under the Cartwright Act (FAC, ¶ 298), and because all the other elements of associational
 24 standing are met as described above, le GESTE demonstrates such standing.

25 While there is not yet a ruling by the Supreme Court of California regarding associational
 26 standing under the UCL since the passage of Proposition 64, again, there is well-reasoned
 27 intermediate-appellate court authority consistent with le GESTE’s standing here. *See Animal Legal*
 28 *Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1281 (2015) (granting organizational

standing under the UCL). While another appellate division in *California Med. Ass’n. v. Aetna Health of California Inc.*, 63 Cal. App. 5th 660 (2021), denied associational standing to a plaintiff organization after holding that Proposition 64 eliminated access to such standing, that ruling rests on the assumption that California voters intended to dismantle associational standing despite those words never appearing within the text of Proposition 64. Given that the UCL’s purpose is to “protect both consumers and competitors by promoting fair competition in commercial markets for goods and services,” *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 949 (2002), and that the outcome in *Animal Legal Def. Fund* is consistent with the California Supreme Court’s decision in another key UCL case, *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 317 (2011) (holding Proposition 64 should be read to “strip [] unaffected parties of the ability to file ‘shakedown lawsuits,’ while preserving for actual victims of deception and other acts of unfair competition the ability to sue and enjoin such practices”), the California Supreme Court is likely to find that organizations such as le GESTE have associational standing under the UCL where they have been actually harmed, as has le GESTE.

D. Plaintiffs’ claims are timely; nor does laches bar any of them.

1. Plaintiffs’ Sherman Act claims are timely; nor does laches bar them.

Plaintiffs’ Sherman Act claims for damages are timely because of the continuous violation doctrine, or alternatively, because plaintiffs entered into new contracts annually. (*Cf.* MTD at 22-23.) Furthermore, there is no statute of limitations for their claims for injunctive relief. *See, e.g., Oliver v. SD-3C LLC*, 751 F.3d 1081, 1085 (9th Cir. 2014). And laches does not bar those claims per the four-year statute of limitations guideline that Apple itself references in its motion.

Although Figaro and L’Équipe entered into the DPLA in 2009, MTD at 22, plaintiffs allege that they have been subject to Apple’s abuse within the four-year limitations period for antitrust damages claims. *See* 15 U.S.C. §15b; FAC, ¶¶ 80, 129, 215, 253 n.245. (Apple argues—in another footnote—that it “preserved its statute of limitations defense in *Cameron*,” MTD at 21 n.21. But *Cameron* is a different case, and Apple never actually filed a motion to dismiss there.) Thus, per the continuing violation doctrine, plaintiffs’ claims are timely. *See, e.g., Samsung Elecs. Co., Ltd. v. Panasonic Corp.*, 747 F.3d 1199, 1202 (2014); *In re Glumetza Antitrust Litig.*, 2020 WL 1066934, *5-6 (N.D. Cal. Mar. 5, 2020). As the Ninth Circuit stated, “This standard is meant to differentiate

1 those cases where a continuing violation is ongoing—and an antitrust suit can therefore be
 2 maintained—from those where all of the harm occurred at the time of the initial violation.” *Samsung*,
 3 747 F.3d at 1202.

4 Here, nothing about plaintiffs’ entry the first time into the DPLA established immutable
 5 obligations, such that “all of the harm occurred” at entry into the first contract (or upon the first
 6 overcharge or other abuse of monopoly power), and Apple points to none. *Cf. Samsung*, 747 F.3d at
 7 1203 (referring to illustrative precedent where the Ninth Circuit “held that a cause of action accrued
 8 each and every time that a tourist was shepherd away from the plaintiff’s non-preferred shop
 9 because even though the agreement predated the limitations period, the agreement itself did not
 10 ‘immediately and permanently destroy’ plaintiff’s business nor did it cause irrevocable, immutable,
 11 permanent, and final injury.”) (citation omitted); *Glumetza*, 2020 WL 1066934, at *5. In fact, Apple
 12 has altered its commission rate for certain developers and changed the terms of other restrictions,
 13 too, notwithstanding the terms of the DPLA, FAC, ¶¶ 17 n.18, 125, 128, which also have changed
 14 over time. And unlike the situation in the out-of-circuit case *US Airways, Inc. v. Sabre Holdings*
 15 *Corp.*, 105 F. Supp. 3d 265 (S.D.N.Y. 2015), where the statute-of-limitations issue was decided *after*
 16 *discovery*, and not on a motion to dismiss, the parties enter into a new contract here, punctuated by
 17 the mandatory payment of a fee, every year. (FAC, ¶¶ 37, 47, 57.)

18 As for laches, it does not prevent plaintiffs’ prosecution of their claims for injunctive relief.
 19 First, Apple provides no authority for the proposition that French-resident developers are under some
 20 obligation to learn of litigation undertaken by plaintiffs in the U.S. in order to seek redress under the
 21 laws and in a forum of Apple’s choosing. Second, Apple offers no compelling reason to ignore the
 22 four-year guideline of the statute of limitations, which does not bar plaintiffs’ claims based on
 23 injuries during the four-year limitations period for the reasons stated above. *Cf. Oliver*, 751 F.3d at
 24 1087; *see also Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) (“[A]
 25 laches determination is made with reference to the limitations period for the analogous action at law.
 26 If the plaintiff filed suit within the analogous limitations period, the strong presumption is that laches
 27 is inapplicable.”) (citation omitted). There also is no prejudice to Apple. Plaintiffs allege that Apple
 28 inflicted anticompetitive, abusive acts during the four-year period before filing. (FAC, ¶ 80, 129,

215, 253 n.245.) Further, while Apple complains that it settled *Cameron* only to be faced with further litigation, these are different plaintiffs not covered by *Cameron*'s negotiated release or the litigation in that case. It was Apple that did nothing to try to dispose of claims by these *different* plaintiffs, despite well-knowing that it subjects iOS developers worldwide to the same agreements and conduct, pursuant to its self-same willfully acquired and maintained monopoly power.

2. Plaintiffs' UCL claims are timely; nor does laches bar them.

Plaintiffs' UCL claims are timely just as their Sherman Act claims are timely. Apple's unpublished authority, *Hameed v. IHOP Franchising LLC*, 520 Fed. App'x. 520 (9th Cir. 2013) illustrates this. In *Hameed*, claims accrued on a date outside the limitations period "when the contracts were formed." *Id.* at 522. Here, plaintiffs' claims accrued *at the earliest* under Apple's theory when the parties entered into new yearly contracts. (*See* FAC, ¶¶ 37, 47, 57.) Likewise, Apple's Developer Guidelines, which contain its anti-steering provisions, *cf.* MTD at 24, that repeatedly and continually rob plaintiffs of the ability to communicate with their customers via their digital products as they choose, *cf.* MTD at 6 n.5, also come into effect anew every year for developers that opt to renew the DPLA, such that plaintiffs' claims for injunctive relief are timely. (MTD at 24.) Further, continuous accrual would apply here since, unlike in *Hameed*, plaintiffs here claim that there are "recurring wrongful act[s]," including payments of super-high commissions during the limitations period. *Cf. Hameed*, 520 Fed. App'x. at 522; *see also Aryeh v. Canon Bus. Sols.*, 55 Cal.4th. 1185, 1199 (2013) ("Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation."). Finally, plaintiffs do allege continuous violations that stem from a course of conduct, FAC, ¶¶ 17, 22. *Cf. Hameed*, 520 Fed. App'x. at 522.

As for laches—an argument Apple raises in yet another footnote—the "strong presumption" is that it should not apply given plaintiffs' compliance with the statute of limitations, as Apple's own authority states. *See, e.g., Jarrow*, 304 F.3d at 835. Moreover, there is no unreasonable delay here, where Apple's behavior are a function of contracts and guidelines that are entered into anew every year, and effects that injuries that continually occur and constitute a deleterious course of action. Further, unlike the defendant in *Jarrow*, upon which Apple relies, there is no prejudice to Apple from plaintiffs seeking redress under these circumstances, where injuries continue to accrue. *Cf. id.*

at 840 (prejudice noted where defendant had invested sums into presentation of its product to the product over the period of delay). Moreover, at most, laches in proper circumstances applies only in determining a UCL *remedy*, not to preclude a UCL cause of action, such that laches should not be applied on the instant motion to bar plaintiffs' UCL *claims*. *E.g., Stuart v. Radioshack Corp.*, 2009 WL 281941, at *7 n.1 (N.D. Cal. Feb. 5, 2009).

3. Plaintiffs' Cartwright Act claims are timely and otherwise viable.

Without authority, Apple contends that plaintiffs' Cartwright Act claims are untimely per the applicable four-year statute of limitations. Apple's theory is that plaintiffs' entry into their contracts with it began the running of the limitations period. But again, plaintiffs entered into these contracts every year anew, and paid a new program fee just as they did with the first contract. Apple would not have allowed them to distribute their digital products under the last year's contract, FAC Ex. A, ¶ 11.1, so the limitations period began again every year. Further, the continuous accrual doctrine applies to preserve their claims as well. *See Aryeh*, 55 Cal.4th. at 1192, 1198-99.

Apple also argues in another improper footnote, on the basis of state trial court rulings that cannot be relied upon as reflecting settled law, *see, e.g., Alexander v. Select Comfort Retail Corp.*, 2018 WL 6726639, at *3 (N.D. Cal. Dec. 21, 2018) (Gonzalez Rogers, J.), that plaintiffs' Cartwright Act fails because the "statute requires a 'combination of more than one actor.'" (MTD at 25 n.28) Apple further takes issue with respect to the concept of a coerced agreement. (*Id.*) But this Court disagreed with a similar argument Apple made in the *Epic Games* matter, where Apple contended that plaintiff's claim failed for failure to show "concerted action" as distinct from "unilateral conduct." 559 F. Supp. 3d 1048 n.624. As the Court noted, the DPLA might "include particular terms that would constitute unreasonable restraints of trade," per plaintiff's complaint. *Id.* Here, too. (*See* FAC, ¶¶ 80-86, 168-170, 292-294.) In any event, even if Apple had properly supported its theory, it would at best raise issues that require factual development for disposition—including as to whether there was a "coerced" agreement. (*Cf.* MTD 25 n.28.)

E. Plaintiffs may proceed with their alternative claims for restitution.

Finally, Apple is wrong that Figaro and L'Équipe cannot proceed with their claims for restitution under the UCL. (MTD at 25.) The parties are at the pleading stage, before the

development of the record. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), is inapplicable because restitution claims in that case were addressed “[o]n the brink of trial, after more than four years of litigation,” and after plaintiff sought to create conditions for restitution by dismissing her sole claim for damages. *Id.* at 837-38. Further, in that case, “[b]oth sides took discovery, engaged in motion practice, and prepared for the looming jury trial,” and “nothing *in the record*,” *i.e.*, the developed record, supported the conclusion that “the same amount of money for the exact same harm [wa]s inadequate or incomplete.” *Id.* (emphasis added). Under these circumstances, *Sonner* does not require dismissal of plaintiffs’ claims for restitution, which they have pled in the alternative, FAC, ¶¶ 227, 284, 287, and given their plea that such relief would obtain should there be no adequate remedy at law, *id.*, Prayer for Relief Sec. D. *See Warren v. Whole Foods Mkt. California*, 2022 WL 2644103, at *9-10 (N.D. Cal. July 8, 2022) (“*Sonner* has limited applicability to the pleading stage and the general liberal policy courts have toward pleading in the alternative allow[s] the equitable restitution claim to proceed past the pleading stage even though the plaintiff [is] also seeking contract damages.”). Respectfully, plaintiffs should be allowed to proceed with their alternative restitution claim, which can be revisited if needed following discovery and development of the record. *See id.* at *9.

V. CONCLUSION

For the foregoing reasons, Apple’s motion should be denied in its entirety. Alternatively, plaintiffs should be permitted to amend their complaint as needed to preserve each and every of their claims. Given Apple’s forum-selection provisions, such leave should include, as necessary, the right to plead the applicability of French or European Union law herein if the Court were to conclude at this time, notwithstanding the lack of a factual record, that the FTAIA bars any of plaintiffs’ claims.

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Respectfully submitted,

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